QUESTIONS PRESENTED

1. Whether, in times of emergency, the Federal Power Commission has authority under the Natural Gas Act to accept, approve or modify a plan of an interstate pipeline for the curtailment of natural gas deliveries to both direct-sale and resale customers.[1]

2. Whether an appellate court should, in a collateral proceeding, determine the Federal Power Commission's jurisdiction over facilities being operated by an interstate pipeline when that issue is then being litigated before the Commission.

STATUTES INVOLVED

The statutory provisions involved (United Pet. App. D, at 43a) are Sections 1(b), 4, 5, 7, 16 and 19(b) of the Natural Gas Act (Act), as amended, 15 U.S.C. §§ 717(b), 717c, 717d, 717f, 717*o*, 717r(b) (1970).[2]

STATEMENT

This country faces a national energy crisis of mammoth proportions caused by the current industry-wide shortage of natural gas. A Federal Power Commission (FPC) staff report recently issued shows that this shortage will increase sharply in the coming years.[3] On March 2, 1972, the Chairman of the President's Oil Policy Committee testified before the Senate Committee on Interior and Insular Affairs that it will be necessary to ration gas on an end-

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[1] Direct-sale customers are customers who consume the gas purchased from United. Resale customers are customers who sell gas purchased from United to others, and include gas distribution companies and other pipelines.

[2] Act of June 21, 1938, 52 Stat. 821-24, 830-31.

[3] FPC Staff Report No. 2: National Gas Supply and Demand 1971-1990 (February 1972).

use basis if present trends continue.[4] In the face of this crisis the court below held that the FPC is powerless to permit United to curtail deliveries to direct industrial users so as to insure adequate supplies for domestic consumptive use.

United Gas Pipe Line Co. (United), a jurisdictional pipeline,[5] is a major supplier of gas to jurisdictional pipelines supplying much of the gas used in the eastern half of the United States (FPC Pet. App. I, at 95a). All of United's sales, service and facilities, except some of those in its Victoria and New Orleans Divisions, have been certificated by the FPC pursuant to Section 7 of the Act (A. 173; R. 284). An application to certificate all of United's uncertificated sales, service and facilities is presently pending in a Section 7 certificate proceeding before the FPC (A. 173; R. 284-85). *United Gas Pipe Line Co.*, FPC Docket No. CP 71-89.[6]

Since November 1, 1970, United has been responding to the gas shortage by curtailing industrial gas deliveries to both direct and resale customers pursuant to plans filed in curtailment proceedings before the FPC.

On March 31, 1971, while the FPC was conducting hearings concerning United's curtailment plan, Louisiana Power & Light Company (LPL), one of United's direct-sale customers and a party to both the curtailment and certificate proceedings (A. 140-41, 154; R. 228-29, 251), filed a suit

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[4] Testimony of Gen. George A. Lincoln, Director of the Office of Emergency Preparedness, March 2, 1972.

[5] "Jurisdictional pipeline" means a pipeline which is subject to the jurisdiction of the FPC as a result of the transportation or sale for resale of natural gas in interstate commerce.

[6] On February 9, 1972, the FPC found that all of United's uncertificated sales, service and facilities are subject to FPC jurisdiction. *United Gas Pipe Line Co.*, FPC Docket No. CP71-89 (Opinion No. 610, February 9, 1972) (United Pet. App. F, at 91a).

collaterally attacking the FPC's jurisdiction to conduct both proceedings. Basing jurisdiction in the district court on 28 U.S.C. § 1332 because of diversity of citizenship, LPL claimed United's curtailment plan was a breach of its contracts with LPL and asked for an injunction against curtailment of deliveries to it pursuant to the plan (A. 11; R. 14).

On June 30, 1971, LPL's suit was dismissed for lack of jurisdiction (A. 266; R. 437). The district court held that the FPC proceeding in which United's curtailment plans had been filed was well within the FPC's jurisdiction and that LPL was required to exhaust its administrative remedies in that proceeding and the related[7] certificate proceeding (A. 256-66; R. 422-37).[8]

The court of appeals reversed. It held that the FPC has no jurisdiction to regulate curtailment of deliveries to direct industrial users, reasoning that once a direct sale is certificated pursuant to Section 7 of the Act, it may not

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[7] The curtailment and certificate proceedings are related because the FPC opinion finding curtailment jurisdiction, *United Gas Pipe Line Co.*, FPC Docket Nos. RP71-29, RP71-120, RP71-99 (Opinion 606, October 5, 1971), made clear that if the facilities for which certificates have been requested in the certificate proceeding are interstate in character and subject to FPC jurisdiction, the FPC ruling in the curtailment proceeding concerning the FPC's jurisdiction over curtailment programs will apply to volumes transported through those presently uncertificated facilities (United Pet. App. E, at 60a).

[8] This was the second dismissal for lack of jurisdiction. Also relying on the exhaustion doctrine, Judge Dawkins first dismissed the case on April 29, 1971, after considering briefs and after having heard argument from LPL on two occasions in connection with its request for a temporary restraining order (A. 116; R. 187-88). On May 14, 1971 an administrative panel of the Fifth Circuit vacated the judgment of dismissal, reinstated the restraining order which had been dissolved by the trial court and remanded the case for an evidentiary hearing on the jurisdictional issue and on such other preliminary issues as might properly be raised (A. 119-21; R. 192-96). Judge Dawkins at the request of LPL, then recused himself, and the case was reassigned to Judge Scott.

be further regulated short of an FPC abandonment order (United Pet. App. A, at 22a). The court of appeals further held that the FPC has no regulatory jurisdiction over United's New Orleans District, reasoning that the flow of gas through that District is, in its view, essentially intrastate rather than interstate (United Pet. App. A, at 25a). The district court finding that the FPC's expertise was necessary for the proper consideration of such issues was disregarded (United Pet. App. A, at 23a).

SUMMARY OF ARGUMENT

Not having enough gas to meet both industrial boiler fuel needs and the needs of domestic consumers, United and many other interstate pipelines have found it necessary to file curtailment plans with the FPC. In curtailment proceedings under Sections 4 and 5 of the Natural Gas Act, the FPC, as it did after World War II, has been attempting to protect small consumers by permitting these interstate pipelines to curtail industrial deliveries to both direct and resale customers.

In its opinion and order dealing with United's curtailment plan (Opinion 606), the FPC ruled that it has the authority in connection with its action on pipeline curtailment plans to allocate the interstate gas supplies of a jurisdictional pipeline among all that pipeline's customers, despite the fact that it has no rate jurisdiction over direct industrial sales. The court below, in a collateral proceeding, has held that the FPC does not have such jurisdiction. The court below also held that the FPC has no regulatory jurisdiction over United's New Orleans District and thereby deprived the FPC of the opportunity to make the initial determination of its jurisdiction over those facilities.[9]

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[9] The FPC has since determined that these facilities are jurisdictional. *See* note 6, *supra*.

United contends that the FPC curtailment ruling, rather than the decision of the court below, is correct and that, in light of the doctrine of exhaustion of administrative remedies, the court below improperly predetermined the FPC's jurisdiction over United's New Orleans District.

A

Section 1(b) of the Natural Gas Act gives the FPC plenary authority over interstate transportation. Curtailment is a matter of service interruption and thus is largely related to transportation, *Panhandle Eastern Pipe Line Co.* v. *Public Serv. Comm'n,* 332 U.S. 507 (1947); as such, the problem of curtailments is clearly within the FPC's jurisdiction to regulate. Since Congress, by the passage of the Natural Gas Act, intended that there be a comprehensive and effective regulatory scheme, the inability of state agencies and individual courts to protect consumers in shortage situations confirms the FPC's curtailment jurisdiction. In addition, the FPC authority over curtailments is inherent in the FPC's obligation under Sections 4 and 5 to prevent unreasonable preferences or discriminations in service and its general powers under Section 16 to perform all acts necessary to discharge its statutory responsibilities. The FPC's curtailment authority is in no way limited by Section 7 of the Act since its transportation jurisdiction under Section 1(b) and its duty to prevent discrimination in service under Sections 4 and 5 exist independently of its certification and abandonment authority under Section 7.

B

LPL's claim that United's New Orleans District is a local system not subject to FPC regulation does not relieve LPL of the requirement that it exhaust its administrative rem-

edies in the FPC certificate proceedings. The court below should not have predetermined the FPC's certificate jurisdiction since Congress intended that FPC jurisdictional questions be reviewed by the court of appeals only in Section 19(b) review proceedings. The requirement of initial agency determination and review pursuant to Section 19(b) is particularly compelling when the jurisdictional result depends on analysis of a complicated factual picture and application of specialized legal concepts, based upon a full evidentiary record. In any case, the court of appeals based its holding upon a *de minimis* rationale which has been expressly rejected by this Court.

ARGUMENT

I. The FPC Has Curtailment Authority Over Deliveries To A Jurisdictional Pipeline's Direct Industrial Customers.

A. Section 1(b) Of The Act Gives The FPC Plenary Authority Over The Transportation Of Natural Gas In Interstate Commerce.

The language of Section 1(b) is clear and unambiguous; it states:

> "The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale . . . and to natural gas companies engaged in such transportation or sale. . . ." 15 U.S.C. § 717(b).

This Court has held that Section 1(b) gives the FPC regulatory authority over (1) transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale. *Panhandle Eastern Pipe Line Co.* v. *Public Serv. Comm'n*, 332 U. S. 507 (1947). Although Congress limited the FPC's jurisdiction over *sales* to sales for resale, Congress in Section 1(b) gave the FPC unlimited jurisdiction over the *transportation* of all gas in interstate commerce, and over *companies* engaging in *such transportation*.

In *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U.S. 464, 473 (1950), this Court reaffirmed the view, expressed three years earlier in the 1947 *Panhandle* decision, that Section 1(b) contains three discrete grants of jurisdiction by holding that East Ohio Gas was a "natural gas company" subject to the FPC's accounting regulations because it was engaged in the transportation of natural gas in interstate commerce, despite the fact that East Ohio Gas made only direct sales which were not subject to Commission rate regulation.

In reality, the court of appeals did not challenge the independent status of FPC transportation jurisdiction. Rather, the court of appeals seemed to think that the exercise of that transportation jurisdiction was somehow inconsistent with the Section 1(b) exemption of direct sales from FPC rate jurisdiction. (United Pet., App. A, at 21a). The deficiency of this analysis is manifest in the decisions of this Court.

In *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1961) (*Transco*), the pipeline argued that the FPC could not consider the price factor in deciding whether or not to certificate a direct industrial sale because the FPC had no rate jurisdiction over direct sales. Characterizing the pipeline's argument as overly broad, 365 U.S. 1, 26, this Court observed that it had on several occasions rejected similar arguments. By way of example this Court, in *Transco,* referred to its holding in *Colorado Interstate Gas Co.* v. *FPC,* 324 U.S. 581 (1945), that the FPC could, in connection with fixing a pipeline's resale rates, take into account the value of the pipeline company's production and gathering facilities even though Section 1(b) exempts such facilities from FPC jurisdiction. As noted in *Transco,* in reaching the *Colorado Interstate* result, this Court rejected the argument that to include

the value of production and gathering facilities in a rate base was to regulate the production and gathering of natural gas contrary to the provisions of Section 1(b).

This Court concluded its disposition of the pipeline's argument by referring, 365 U.S. 1, 26, to its statement in *Panhandle Eastern Pipe Line Co.* v. *FPC*, 325 U.S. 635, 646, (1945), to the effect that the FPC may take direct industrial rates into consideration when it fixes resale rates despite the fact that it has no jurisdiction over direct-sale rates.

Thus the fact that the FPC lacks rate jurisdiction over direct industrial sales in no way limits the reach of the FPC's powers in discharging its obligations to regulate interstate transportation and the companies doing the transporting. The language of Section 1(b) and the decisions construing that language compel the conclusion that the separate grant of transportation jurisdiction gives the FPC the plenary authority over curtailment plans which it has asserted in Opinion 606.[10]

This independent grant of transportation authority is obviously what this Court had in mind when, in *Panhandle Eastern Pipe Line Co.* v. *Public Serv. Comm'n, supra,* it said with respect to direct sales:

> "... [T]he matter of interrupting service is one largely related ... to transportation and thus within the jurisdiction of the Federal Power Commission to control,

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[10] *United Gas Pipe Line Co.*, FPC Docket Nos. RP71-29, RP71-120, RP71-99 (Opinion 606, October 5, 1971) (United Pet. App. E, at 55a). On March 6, 1972, this Court denied United's petition for a writ of certiorari to review Opinion 606 prior to judgment in the court of appeals. Accordingly, the six review proceedings instituted pursuant to Section 19(b) of the Act are still pending in the court of appeals. By orders entered on January 28, 1972, and February 16, 1972, the court of appeals has consolidated these six proceedings; the lead case is *Louisiana Power & Light Co., et al.* v. *Federal Power Comm'n*, No. 71-3429 (5th Cir., filed December 3, 1971).

in accommodation of any conflicting interests among various states." 332 U.S. 507, 523.

This view, in light of the current shortage, is more important today than it was 25 years ago.

B. Unless The FPC Has Curtailment Jurisdiction Over Industrial Gas There Can Be No Comprehensive And Effective Regulation Of Curtailment.

In *Transco, supra,* this Court stated:

> ". . . Congress did not desire an 'attractive gap' in its regulatory scheme; rather, Congress intended to impose a comprehensive regulatory system on the transportation, production, and sale of this valuable natural resource. Therefore, when we are presented with an attempt by the federal authority to control a problem that is not, by its very nature, one with which state regulatory commissions can be expected to deal, the conclusion is irresistible that Congress desired regulation by federal authority rather than nonregulation. See *Panhandle Eastern Pipe Line Co.* v. *Federal Power Comm'n,* 232 F. 2d 467." 365 U.S. 1, 28.

State regulatory agencies cannot deal effectively with the problems of service priorities created by an interstate pipeline's systemwide gas shortage. Indeed, state agencies face insurmountable obstacles, both practical and legal.

The natural gas transmission industry involves a vast interstate network of interconnected transmission lines (FPC Pet. App. H, at 93a). Most of these pipelines make some direct sales (FPC Pet. App. I, 95a). No state commission, even if it had jurisdiction over industrial sales within its borders, could regulate curtailments on a systemwide basis. Thus no state agency could insure that curtailment plans will prefer domestic needs over industrial boiler fuel requirements and thereby forge the complete, per-

manent and effective bond of protection to consumers for which the Act was framed. *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U.S. 137, 147 (1960).

Aside from the inability of state regulatory agencies to regulate curtailments on a systemwide basis, other practical problems exist. A gas-producing state with growing industrial needs has a natural tendency to give those needs a high priority. For example, the Louisiana Public Service Commission instituted two proceedings against United for this express purpose,[11] and following the court of appeals decision in this case, filed suit against United and the FPC in furtherance of that purpose. *LPSC* v. *United Gas Pipe Line Co., et al.*, Civ. No. 17,631 (W.D. La., filed February 23, 1972).[12]

And even if a state agency's order increasing industrial deliveries within that state's borders were founded on reasons other than its desire to fuel industrial growth at the expense of consumers in other states, the resulting burden on interstate commerce would violate the commerce clause of the United States Constitution. *Public Utilities Commission of Rhode Island* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927); *The Minnesota Rate Cases*, 230 U.S. 352, 381, 396-97, 400 (1913).

Nor can courts be expected to do the job. In *Atlanta Gas Light Co., et al.* v. *Southern Natural Gas Co., et al.*, Civ. No. 16060 (N.D. Ga., February 11, 1972), the court, in

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[11] *United Gas Pipe Line Co.*, LPSC Docket No. 11009 (Special Order 7-71, September 28, 1971); *Louisiana Intrastate Gas Corp., et al.*, LPSC Docket No. 11010 (General Order, September 30, 1971).

[12] The suit seeks an injunction to prevent United and the FPC from treating United's New Orleans District as a part of its interstate system. The immediate effect of the suit would be to remove direct-sale gas deliveries made through the facilities of the New Orleans District from FPC curtailment jurisdiction.

dismissing a suit similar to the one filed by LPL except involving sales for resale, noted:

> "At this time the FPC is the proper and only forum for a gas allocation determination—any different conclusion would lead to a chaotic situation since, for example, a court in Mississippi could determine what gas consumers should receive in that state while, at the same time, an Alabama court was trying to protect Alabama consumers of gas. If that kind of situation were allowed, certainly all of Southern Natural's customers in other states would begin the race to the courthouse. Then which would Southern Natural obey—more importantly, where would Southern Natural get the gas to meet all the mandates of the various courts?"[18]

Finally, one must not lose sight of the fact that depriving the FPC of jurisdiction over United's deliveries to LPL leaves those deliveries totally unregulated since the Loui-

[18] A similar concern was voiced by the House Committee on Interstate and Foreign Commerce in 1947 in its consideration of a proposed amendment to the Act which would have expressly conferred upon the states regulatory authority over direct sales. In explaining its conclusion that such an amendment would not be in the public interest the House Commerce Committee stated:

> "Your committee feels that to alter the present situation would present a chaotic situation. If the States were given jurisdiction over direct sales by a pipe line traversing several States, it would be under a dual system of control by the Federal Power Commission and the States. There is no assurance of uniformity of treatment by the different states. The power to regulate direct sales would include the power of curtailment and interruption of service. The different States would conceivably have different views on the matter of curtailment and interruption regardless of its effect on the needs for gas in other States. Curtailment and interruption of service concerns more than one State and endless confusion and conflict would arise between different States demanding gas as between States and the pipe lines. Also it is conceivable that conflicts would arise between the Federal Power Commission jurisdiction as against the demands of the States to regulate prices, to interrupt service and to curtail service." H.R. REP. No. 800, 80th Cong., 1st Sess. 10-11 (1947).

siana Public Service Commission is constitutionally prohibited from exercising jurisdiction over any aspect of an industrial sale. LA. CONST. art. 6, § 4.

Recognition of these circumstances, in light of the Congressional purpose to effect a comprehensive regulatory scheme, is not to argue, as the court of appeals suggests, that need alone can create federal agency power (United Pet., App. A, at 16a). Rather, the argument demonstrates that Congress intended federal regulation of curtailment because the problem is one with which state agencies and individual courts cannot be expected to deal.

C. FPC Authority Over Curtailments Is Inherent In Other Powers Granted By The Act.

The Congressional plan for federal regulation of the gas transmission industry is apparent from the structure of the Act. First, Congress made clear in Section 1(b) that it intended to regulate (1) all interstate transportation of gas and (2) the companies engaged in either interstate transportation or in sales for resale of gas in interstate commerce. Then, Congress took two principal approaches to effectuate its regulatory purpose. It (1) proscribed certain activity by jurisdictional pipelines in Sections 4 and 7 and (2) granted authority to the FPC in Sections 5, 7 and 16 to see that the standards of conduct laid down for jurisdictional pipelines were observed.

In Section 4(b) jurisdictional pipelines were told:

> "No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in

rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service." 15 U.S.C. § 717c(b). (Emphasis supplied.)

Further in Section 7(c) jurisdictional pipelines were told:

"No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations." 15 U.S.C. § 717f(c).

In addition jurisdictional pipelines were told in Section 7(b) that they may not abandon any jurisdictional facilities or any service rendered by means of those facilities without Commission approval.

In Section 5(a) the FPC was told:

Whenever the Commission . . . shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order . . ." 15 U.S.C. § 717d(a).

In addition to these duties, and the duties imposed on the FPC in Section 7 in connection with initial certification and

abandonment, Congress gave the FPC further broad powers in Section 16:

> "The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act. . . ." 15 U.S.C. § 717*o*.

Just as Section 1(b) declares that the FPC has regulatory authority over both transportation and sales for resale, Sections 4 and 5 cover transportation *or* sale, service *and* rates.

Thus the argument that the Commission has no curtailment jurisdiction over industrial gas is an argument that the FPC, despite the prohibitions of Section 4 and the authority granted in Section 5, is powerless to prevent the undue preference and advantage which industrial customers will receive over domestic users if substantial industrial volumes are burned up under boilers during times of shortage. This argument was rejected by the Sixth Circuit in *Michigan Consolidated Gas Co* v. *Panhandle Eastern Pipe Line Co.*, 173 F.2d 784 (6th Cir. 1949) when it observed:

> "If the Commission has no authority to order adequate service to customers, in view of all the conditions and circumstances involved, the basic purpose of the Natural Gas Act fails of realization. We can attribute to the Congress no purpose to withhold from the Commission control over services. The power to prevent preferences and discrimination both as between individuals and classes, carried with it by necessary and inescapable implication, authority to regulate service." 173 F.2d 784, 789.

The attempt of the court below to distinguish this case on the ground that it involved a dispute between a pipeline and a resale customer will not stand examination. Although

its description of the parties is accurate, the court below failed to perceive that the Sixth Circuit's holding was based on the FPC's broad authority to prevent discriminations and was in no way based on the fact that Michigan Consolidated was a resale customer.

Likewise the Section 7 argument advanced by LPL and adopted by the court of appeals (United Pet. App. A, at 22a) is not persuasive. The court of appeals recognized that the FPC has the power under Section 7(c) to refuse to permit an industrial sale to be made in the first place and further power under Section 7(b) to order the abandonment of that sale. However, the court held that the FPC is powerless to order a temporary reduction in deliveries to direct customers in order to respond to an emergency created by a systemwide shortage of gas. In the court of appeals' view the FPC may respond to such a crisis only through abandonment proceedings under Section 7(b).

This result ignores the uniform holdings in rate and abandonment contexts that the FPC's exercise of jurisdiction granted by Section 1(b) is in no way dependent upon a certificate having been issued or even upon an application for a certificate having been filed. *Sun Oil* v. *FPC*, 281 F.2d 275 (5th Cir. 1960) (rate); *Magnolia Petroleum Co.* v. *FPC*, 226 F.2d 234 (5th Cir. 1959), *cert. denied sub nom., Socony Mobil Oil Co.* v. *FPC*, 363 U.S. 842 (1960) (rate); *J. M. Huber Corp.* v. *FPC*, 236 F.2d 550, 556-57 (3d Cir. 1956), *cert. denied*, 352 U.S. 971 (1957) (abandonment). If the power to set rates and order abandonment may be exercised when no certificate has been issued, or even applied for, it is clear that curtailment authority exists independently of certificate status. It would be a curious result indeed to read the Act so as to give the FPC less power over a jurisdictional pipeline which has complied

with the Section 7 certificate requirements than it has over pipelines which have failed to comply with Section 7, or to conclude that an act which empowers the FPC to deny service altogether or to order its total and complete abandonment does not contain authority for the FPC to regulate curtailments during periods of shortage.

The result also has serious practical consequences. When a shortage arises it is imperative that a system of priorities be promptly imposed so that both the pipeline and its customers will know the delivery priorities. By requiring pipelines to file plans under Section 4 of the Act, as it did in Order 431,[14] the FPC can insure that consumers are protected as soon as the shortage arises. Section 7(b) abandonment proceedings do not have this inherent flexibility.

The FPC has broad authority under Sections 5 and 16 to prevent a jurisdictional pipeline from granting an undue preference or advantage to a particular class of service. That jurisdiction is in no way dependent on Section 7; indeed limiting its exercise to abandonment proceedings under Section 7(b) would effectively destroy the FPC's ability to prevent preferences in curtailment situations when total abandonment of service is not required.

D. The FPC Has Exercised Curtailment Authority Over Direct Sales In Previous Shortage Situations.

As the FPC noted in Opinion 606 (United Pet. App. E, at 65a), curtailment situations are not new. Following World War II, the FPC required Panhandle Eastern Pipe Line Company to file rules and regulations governing curtailment and interruption of gas service. These rules, which were initially imposed by agreement between Panhandle and its customers, *City of Detroit* v. *Panhandle Eastern Pipe Line Co.*, 5 FPC 983 (1946), affected both direct and resale customers. The following year, when

[14] FPC Docket No. R-418 (April 15, 1971) (FPC Ex. 20; A. 239; R. 401).

voluntary agreements could not be reached, the FPC imposed similar rules without the consent of the parties. *City of Detroit* v. *Panhandle Eastern Pipe Line Co.*, 6 FPC 196 (1947).

In cases arising out of the FPC's issuance of the Panhandle curtailment orders, the lower courts repeatedly upheld the FPC's authority in curtailment situations.[15] Although these cases are not controlling, they reflect a long-standing interpretation of the Act by both the FPC and the lower courts which is entitled to considerable weight. *Boehm* v. *Commissioner*, 326 U.S. 287, 292 (1945); *United States* v. *American Trucking Ass'n, Inc.*, 310 U.S. 534 (1940); *Helvering* v. *Winmill*, 305 U.S. 79, 83 (1938); *United States* v. *Shreveport Grain & Elevator Co.*, 287 U.S. 77, 84 (1932); *Panhandle Eastern Pipe Line Co.* v. *FPC*, 232 F.2d 467, 471 (3d Cir.), *cert. denied*, 352 U.S. 891 (1956).

In *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), this Court stated:

> ". . . the width of administrative authority must be measured in part by the purposes for which it was conferred . . . . Surely the Commission's broad responsibilities therefore demand a generous construction of its statutory authority." 390 U.S. 747, 776.

The FPC has broad authority over transportation and heavy responsibility to prevent discrimination by jurisdictional pipelines. Since only the FPC can effectively regulate curtailments, surely the FPC's broad responsibilities demand a generous construction of its authority in favor of direct-sale curtailment jurisdiction.

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[15] *Panhandle Eastern Pipe Line Co.* v. *Michigan Consolidated Gas Co.*, 226 F.2d 60, 70 (6th Cir. 1955), *cert. denied*, 350 U.S. 987 (1956); *Panhandle Eastern Pipe Line Co.* v. *Michigan Consolidated Gas Co.*, 177 F.2d 942 (6th Cir. 1949); *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 80 F. Supp. 27, 30 (E.D. Mich. 1948), *aff'd*, 173 F.2d 784 (6th Cir. 1949).

II. The FPC's Jurisdiction Over United's New Orleans District Can Be Determined Initially Only By The Commission And Reviewed Only By Petition To Review Under Section 19(b) Of The Act.

A. LPL's Claim That United's New Orleans District Is A Local System Not Subject To FPC Regulation Does Not Relieve It Of The Requirement That It Exhaust Its Administrative Remedies In The Certificate Proceeding.

It has been settled since this Court's decisions in *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938), and *FPC* v. *Arkansas Power & Light Co.*, 330 U.S. 802, *rev'g mem.* 156 F.2d 821 (D.C. Cir. 1946), that a party may not bypass an agency proceeding merely because the party claims that the agency lacks jurisdiction.

In *Arkansas Power & Light*, the effect of this Court's memorandum decision was to affirm the action of the district court, *Arkansas Power & Light Co.* v. *Federal Power Commission*, 60 F. Supp. 907 (D.D.C. 1945), dismissing a complaint for injunction for lack of subject matter jurisdiction.

In that case, as LPL did here, Arkansas Power & Light sought a declaration that the FPC had no jurisdiction to conduct a proceeding that it was attempting to conduct at the time the complaint for injunction was filed. In disposing of Arkansas Power & Light's claim that an asserted lack of FPC jurisdiction obviated the necessity for exhaustion of administrative remedies, the district court said:

> "If they are allowed to intervene and are aggrieved by an order thereafter issued by the Commission, they may obtain a review of such order as set forth in Sec. 313(b) of the Federal Power Act, supra. If they petition to intervene and their petition is denied, they may ob-

tain a review of such order denying their petition under Sec. 313(b), supra. Moreover, it should be pointed out that the administrative remedies under the Federal Power Act have not been exhausted, and 'no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. That rule has been repeatedly acted on in cases where, as here, the contention is made that the administrative body lacked power over the subject matter' Myers v. Bethlehem Shipbuilding Corp., supra [303 U.S. 41, 58 S.Ct. 459,463]; Miles Laboratories v. Federal Trade Commission, supra." 60 F.Supp. 907, 908.

At the time LPL filed its suit the certificate proceeding was pending before the FPC. LPL was a party to that proceeding (A. 154; R. 251) and was contending in that proceeding that the FPC lacked jurisdiction over United's New Orleans District. Thus, the district court action dismissing LPL's complaint on the grounds that the FPC was competent to decide its jurisdiction in that proceeding and that LPL was required to exhaust its administrative remedies was clearly correct; the court of appeals action in deciding (United Pet. App. 8, at 22a-25a) that the Green System (United's New Orleans District) was not subject to FPC regulation was clearly improper.

The court of appeals rejection of the need for agency expertise in the resolution of this jurisdictional controversy is particularly violative of this Court's decision in *McKart* v. *United States*, 395 U.S. 185, (1969):

> "The agency, like a trial court, is created for the purpose of applying a statute in the first instance. Accordingly, it is normally desirable to let the agency develop the necessary factual background upon which decision should be based. And since agency decisions are frequently of a discretionary nature or frequently require expertise, the agency should be given the first

chance to exercise that discretion or to apply that expertise." 395 U.S. 185, 193-94.

This Court's definitive discussion of the exhaustion doctrine in *McKart* illustrates another major deficiency in the court of appeals' decision. In evaluating the factors which normally require application of the exhaustion doctrine, this Court continued:

> "And of course it is generally more efficient for the administrative process to go forward without interruption than it is to permit the parties to seek aid from the courts at various intermediate stages." 395 U.S. 185, 194.

In this connection, although it is true that LPL did not seek an injunction against the certificate proceeding, the judgment of the court below has already disrupted the administrative process. Commissioner Carver suggests in his dissent in the certificate case, *United Gas Pipe Line Co.*, Docket No. CP71-89 (FPC Opinion 610, February 9, 1972) (United Pet. App. F, at 129a), that the court of appeals' decision, until reversed, deprives the FPC of any further authority to act in the certificate proceeding. The Louisana Public Service Commission's suit against United and the FPC,[16] seeking an injunction against exercise of FPC regulatory jurisdiction over United's New Orleans District, is grounded on the theory that the court of appeals' decision deprives the FPC of jurisdiction. And in the Section 19(b) review proceedings,[17] LPL and the other petitioners in those proceedings argue that United and the FPC are bound under principles of res judicata by the court of appeals judgment in this case.[18]

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[16] *See* note 12, *supra*, and accompanying text.

[17] *See* note 10, *supra*.

[18] *E.g.* Br. LPL 17, *Louisiana Power & Light Co., et al.* v. *FPC*, No. 71-3429 (5th Cir.).

Accordingly, although there has been no injunction against further action in the FPC proceedings, the court of appeals' decision of the jurisdictional issue presented to the FPC in that proceeding clearly violates this Court's command in *McKart*, 395 U.S. 185, 194, that courts ordinarily should not interfere with an agency until it has completed its action, or else has clearly exceeded its jurisdiction.

In *Arkansas Power & Light*, *McKart* and *Myers* this Court makes clear that the FPC should have been given the opportunity to make the initial determination of its jurisdiction over United's New Orleans District. As this Court observed in *Marine Engineers Beneficial Association* v. *Interlake Steamship Co.*, 370 U.S. 173, 185 (1962), the need for initial agency determination of its jurisdiction is particularly compelling when the jurisdictional issue presented to a court is in the process of litigation before the agency.

B. Congress Intended That FPC Jurisdictional Questions Be Reviewed By The Court Of Appeals Only In Section 19(b) Review Proceedings.

In *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958), this Court, in the course of construing Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b), which is substantially identical to Section 19(b) of the Natural Gas Act, stated that Congress, through the Federal Power Act provision:

> ". . . prescribed the specific, complete and exclusive mode for judicial review of the Commission's orders . . . . [and] necessarily precluded *de novo* litigation between the parties of all issues inhering in the controversy and all other modes of judicial review." 357 U.S. 320, 336. (Citations and footnotes omitted.)

The lower court decisions construing Section 19(b) of the Act have reached a similar conclusion. *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 209 F.2d 717 (10th Cir. 1953), *rev'd on other grounds*, 348 U.S. 492 (1955); *Algonquin Gas Transmission Co.* v. *Gregory*, 105 F. Supp. 64 (D. Conn. 1952).

These cases are consistent with this Court's holdings in other contexts that when Congress has provided statutory review procedures designed to permit agency expertise to be brought to bear on particular problems those procedures are to be exclusive. *E.g.*, *Whitney National Bank in Jefferson Parish* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420 (1965).

These decisions mean that under normal circumstances a court must not only give an agency the opportunity to make the initial determination of agency jurisdiction, but must also permit that jurisdictional determination to be reviewed pursuant to the statutory review procedures rather than in a collateral suit.

This principle is particularly applicable to this case. The jurisdictional result in the certificate case depends on a complicated factual analysis of interstate gas flows into and out of the New Orleans District and on the application of the commingling doctrine, *e.g.*, *California* v. *Lo Vaca Gathering Co.*, 379 U.S. 366 (1965); *FPC* v. *Amerada Petroleum Corp.*, 379 U.S. 687 (1965); *Louisiana Public Service Comm'n* v. *Federal Power Comm'n*, 359 F.2d 525 (5th Cir.), *cert. denied*, 385 U.S. 833 (1966). Problems such as these including what the court of appeals described as "simple [gas] flow mechanics" (United Pet., App. A, at 23a) and the legal significance of the factual conclusions, clearly require agency expertise. *Cf. FPC* v. *Florida Power & Light Co.* 40 U.S. L. Week 4141 (1972).

Even a cursory comparison of the court of appeals' analysis of this complicated factual and legal issue (United

Pet., App. A, at 22-25a) with the FPC's analysis (United Pet., App. F at 97a-108a) demonstrates the danger of collateral determination of such jurisdictional issues. In the process of analyzing the incomplete record[19] introduced in the district court for the limited purpose of showing the nature of the issue being considered by the FPC (A. 151-58, 159; R. 246-59, 260), the court of appeals totally ignored the fact that on the 1971-72 peak day over 58 per cent of the gas flowing in United's New Orleans District (589,000 Mcf out of a peak day volume of 1,002,000 Mcf) would be interstate gas (United Ex. 22, Echterhoff Test. 10-11; A. 154, 159; R. 252, 264).

In addition, the court of appeals' characterization of the annual interstate volumes as "minor" (United Pet. App. A, at 22a), when contrasted with the FPC's sophisticated analysis of the *de minimis* contentions advanced in the certificate proceeding (United Pet. App. F, 101a-02a, 107-08a), demonstrates the importance of limiting review of such issues to the Section 19(b) procedures.[20]

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[19] As of the time of the district court hearing the CP71-89 record consisted of 43 pages of testimony and 15 exhibits. Formal hearings did not even begin until June 7, 1971, twelve days after the district court hearing was concluded (A. 1, 2). When the CP71-89 record was closed at the FPC, it consisted of 1,276 pages of transcript, 63 exhibits and 10 items by reference.

[20] When complicated questions of agency jurisdiction are litigated at the agency it is less likely that the reviewing court will be persuaded, as was the court of appeals in this case (United Pet. App. A, at 25a), to adopt theories like the *de minimis* concept discredited by this Court in *Connecticut Light & Power Co.* v. *Federal Power Commission*, 324 U.S. 515, 535-36 (1945).

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed, and that of the district court, affirmed.

Respectfully submitted,

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March 17, 1972

Nos. 71-1016 and 71-1040

SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1971

MOTION FILED
MAR 17 1972

No. 71-1016

FEDERAL POWER COMMISSION,
Petitioner,

v.

LOUISIANA POWER & LIGHT COMPANY, *et al.*,
Respondents.

No. 71-1040

UNITED GAS PIPE LINE CO., *et al.*,
Petitioners,

v.

LOUISIANA POWER & LIGHT CO., *et al.*,
Respondents.

MOTION OF THE BROOKLYN UNION GAS COMPANY FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE BROOKLYN UNION GAS COMPANY IN SUPPORT OF PETITIONERS

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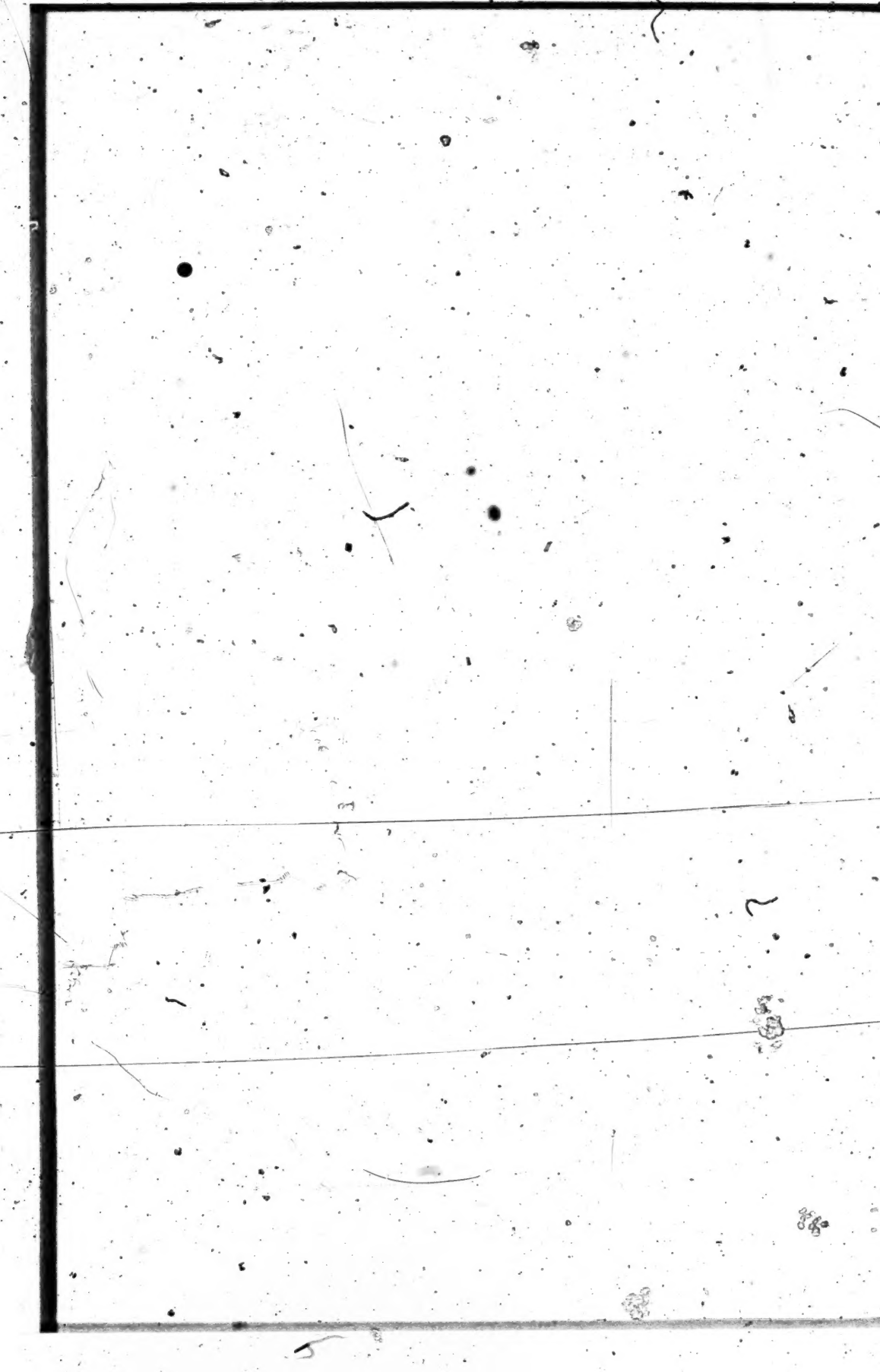

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MOTION OF THE BROOKLYN UNION GAS COMPANY FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 42, The Brooklyn Union Gas Company (Brooklyn Union), respectfully moves for an order granting leave to file a brief *amicus curiae*

on the merits in support of the relief requested by the Petitioners in these cases and shows the following:

1. Written consent to the filing of a brief herein by Brooklyn Union was received from Petitioners, the Federal Power Commission (FPC), Pennzoil United, Inc., and United Gas Pipe Line Company (United), but was refused by Respondent Louisiana Power & Light Company (LP&L).

2. Brooklyn Union is a utility company engaged in the distribution of gas at retail, primarily to domestic customers, hospitals, schools and small businesses, in a service area encompassing approximately one-half of the City of New York. Some 4,000,000 persons are dependent upon this Company for gas for heating, cooking and other essential uses.

3. Brooklyn Union obtains its entire gas supply from three interstate pipeline companies whose facilities originate in the state of Louisiana or other southwestern areas. A substantial portion of this supply is purchased by Brooklyn Union from Texas Eastern Transmission Corporation (Texas Eastern), which, in turn, obtains a substantial portion of its gas supply, directly and indirectly, from United, the Petitioner in No. 71-1040. Texas Eastern, which is not a party to this case, is the largest resale customer of United, purchasing approximately 17% of all gas sold by that pipeline.

4. Movant (like Respondent LP&L) has contracts with its pipeline suppliers entitling it to delivery of certain fixed volumes of gas. However, because of curtailments by United to Texas Eastern, Texas Eastern for some time has not met the contract requirements of Brooklyn Union. As a direct result of the United and Texas Eastern curtailments (and curtailments by another supplier), Brooklyn

Union has been compelled to limit severely the availability of new gas service in its franchise area. In addition, Brooklyn Union's ability to continue to render safe and adequate service to its existing customers is under serious strain.

5. The Fifth Circuit has held that the FPC lacks jurisdiction under the Natural Gas Act to approve or adopt a systemwide curtailment program for an interstate pipeline unable to meet the contract requirements of its customers to assure the equitable apportionment of available gas supplies among *all* its customers, including direct industrial, as well as resale, customers. This decision permits Respondent, a direct customer of United, to seek judicial assistance to compel full contract deliveries to it in contravention of United's curtailment procedures.

6. Since it is physically impossible for a gas-deficient pipeline to make full contract deliveries to its direct customers without further curtailing its resale customers, the decision below subjects Brooklyn Union to additional substantial reductions in gas deliveries through United and other pipelines which have direct industrial customers. Any further significant reduction in pipeline deliveries to Brooklyn Union will make it impossible for Movant to maintain existing levels of service and will necessitate the reduction or discontinuance of gas service to present domestic and other ultimate gas consumers in New York City.

7. Although Brooklyn Union may seek the same or similar relief as that requested by the Petitioners, it has a direct and immediate interest in the case which is different from, and cannot adequately be represented by, any party. Unlike any of the parties, Brooklyn Union (a) is a resale customer of United (through Texas Eastern) and stands to lose substantial volumes of urgently needed gas to Respondent and other direct industrial customers of its pipeline suppliers, if the decision below is permitted to stand, (b) is a public utility required by statute